2013 WL 9761019 (Miss.) (Appellate Brief)
Supreme Court of Mississippi.

Jeanette W. BROWN and Edward J. Wilson, Jr., Appellants,

v.

Virginia K. JONES, Suzette Jones Marlar, Annette Stringer and Virginia Ann Finzel, Appellees.

No. 2013-CA-00032.
July 9, 2013.

Oral Argument not Requested
Appealed from the Chancery Court of Alcorn County, Mississippi

Appellants' Brief

Phil R. Hinton, MSB#2480, Wilson & Hinton, P.A., 505 East Waldron Street, Post Office Box 1257, Corinth, MS 38835, 662-286-3366.

***ii** TABLE OF CONTENTS

***iii** TABLE OF AUTHORITIES

***1** APPELLANTS' STATEMENT OF ISSUES

Claimants are presenting the following issues for review in this Appeal:

1. There is no substantial evidence to support the validity of the Will of J. T. Smith, and therefore the Court erred by upholding that Will.

2. The Court erred by making contradictory finding that Mrs. Brown and Mr. Wilson both had and had not raised the presumption of undue influence, with regard to testamentary gifts.

3. The Court erred by finding that Mrs. Jones and her daughters had overcome the presumption of invalidity of the Will as a result of undue influence, by clear and convincing evidence.

4. The Court erred by refusing to impose a constructive trust on money Mrs. Jones and her daughters obtained from Mr. Smith.

***2 STATEMENT OF THE CASE**

J. T. Smith passed away on May 23, 2006 and Virginia K. Jones initiated the probate of his Will by filing a Petition to Probate Will and Issue Letters Testamentary on June 1, 2006. She was represented by Corinth attorney, James P. Dean. (R 2-13) A Decree Admitting Will to Probate was entered and Letters Testamentary were issued to Mrs. Jones. (R 14-15, 17)

Mrs. Jones, acting through her attorney, Mr. Dean, filed a Petition to Close Estate and Discharge Executrix on October 2,2007. (R 30-35) On that same date, Mr. Dean and Mrs. Jones initiated Publication of Process for Jeanette W. Brown and Edward J. Wilson, Jr., the Plaintiffs below and Appellants here. (R 36)

Mrs. Brown and Mr. Wilson filed two Motions on October 16,2007; one to construe the Will of Mr. J. T. Smith and the other to remove Mrs. Virginia K. Jones as Executrix. (R 43-48) No hearing was conducted on either Motion, but on December 27,2007 an Agreed Order was entered determining that the fourth page of J. T. Smith's Will, was not testamentary in nature, and that said document denominated “Itemized Listing Attachment” was declared to be null and void. Additionally, Mrs. Jones was removed as the Executrix of the Estate, the acting Chancery Clerk, Myra McCollum, was appointed as the Administratrix with the Will Annexed. (R 61, 62)

Jeanette and Edward filed a Motion for Accounting on June 18, 2008 and, after being granted Leave of Court, amended the Motion by filing a Complaint on March 18, 2011. In their Complaint, Jeanette and Edward sought to recover from Virginia K. Jones, and her three daughters, Suzette Jones Marlar, Annette Stringer and Virginia Ann Finzel, money and property which they claimed belonged to the Estate of J. T. Smith. The Complaint also sought to set aside the purported Last Will and Testament of J. T. Smith ***3** and to set aside several inter vivos gifts from Mr. J. T. Smith to Mrs. Jones and her daughters. (R 102-109) The Defendants answered, denying the Plaintiffs' claims or entitlement to any relief. (R 110-113)

Trial was held on April 16 and 17, 2012, and the Court heard testimony from 14 witnesses and received 25 exhibits. (R 124) At the end of the second day of trial, the Chancellor, Honorable Michael Malski, made partial Findings of Fact and Conclusions of Law from the bench (T 311-326) and on June 8, 2012, a Memorandum of Opinion, which also became the Judgment of the Court, was entered. (R 150-166, RE 8-24) Both the Plaintiffs and the Defendants filed post-trial Motions (R 168-180) and an Order granting some relief, and denying other relief, was filed on November 5, 2012. The Chancellor granted a thirty (30) day extension for the filing of an Appeal pursuant to Rule 4 of the Mississippi Rules of Appellate Procedure, and a timely Notice of Appeal was filed on January 3, 2013. (R 192-194)

FACTS

J.T. Smith, a life-long resident of Alcorn County, Mississippi, died on May 23,2006. He had been preceded in death by his wife, Mattie Frances (Matt), who died in 1978. Matt and J. T. had no children. J. T. did have two sisters, Claudia and Audrie, and a

Brother, Bradie, and all predeceased their brother. Claudia and Bradie had no children, but Audrie had two children, Jeanette Wilson Brown and Edward J. Wilson, Jr. They are the Plaintiffs/Opponents and the only blood heirs-at-law of J.T Smith. (R 150)

J. T., who was 86 at the time of his death, had experienced health problems since the mid-1980's. On December 28, 2004, he fell at his home, and was transported by ambulance to Magnolia Hospital in Corinth, Mississippi. When he began experiencing ***4** kidney difficulties at the Corinth facility, he was transported to North Mississippi Medical Center in Tupelo, where he remained until he returned home on February 5,2005. (R150-151)

After returning home, J. T. only went out for medical treatment. He went to these medical appointments by ambulance. At home he was largely bed-ridden although initially he may have been able to sit in a recliner. He had difficulty writing or even buttoning his shirt. He was diabetic, had had cataract surgery, had a pace maker, wore a diaper and had a catheter and even before his fall had a number of previous surgeries. Because of his long bed confinement, J. T. may have developed bed sores on his heels. (R 151)

Virginia K. Jones was the sister of J. T. Smith's wife, Matt. She had helped Mr. Smith in the past, when he was in poor health or required surgery and, after his fall in December of 2004, she spent a great deal of time with him while he was hospitalized, in both Corinth and Tupelo. Mrs. Jones went to AmSouth Bank, where Mr. Smith did his banking, and obtained a Checking Signature Form (Exhibit 2) which she and Mr. Smith signed on January 13, 2005. As a result, she became a co-owner of Mr. Smith's checking account, which contained over $500,000.00, and she began writing and signing checks on his account. Mrs. Jones also had a Corinth attorney who had no relationship with Mr. Smith, prepare a Durable Power of Attorney for Mr. Smith. She took that to Mr. Smith and he signed it before a notary public on January 19, 2005 (Exhibit 19) Both the Check Signature Form and the Durable Power of Attorney were signed while Mr. Smith was hospitalized in Tupelo, Mississippi.

Mrs. Jones withdrew $150,000.00 from Mr. Smith's AmSouth checking account on February 7, 2005, just two days after he returned home from the hospital. She divided that into three Certificates of Deposit of $50,000.00 each. Each Certificate was co-owned by ***5** Mr. Smith, Mrs. Jones and one of her three daughters. (Exhibit 4)

One week later, on February 14, 2005, Mrs. Jones withdrew another $100,000.00 from Mr. Smith's checking account and deposited it into another Corinth bank, CB&S Bank. This Certificate of Deposit listed Mrs. Jones as the primary owner and Mr. Smith as the survivor. (Exhibit 10) Finally, on April 22, 2005, Mrs. Jones removed $200,000.00 from Mr. Smith's AmSouth bank account and deposited it into four $50,000.00 Certificates of Deposit in Southbank. Once again, Mr. Smith and Mrs. Jones were co-owners of the accounts and three of them also included a daughter of Mrs. Smith as a co-owner. The fourth Certificate briefly included one of Mrs. Jones' granddaughters as a co-owner but her name was removed prior to Jeanette and Ed filing their Complaint. (Exhibits 12-15)

According to Mrs. Jones, she picked up a Will at the law office of James P. Dean on July 26, 2005, and took that Will to the home of Mr. Smith. There, and in her presence, Mr. Smith signed the Will and it was witnessed by two of his care givers, Myra Lesley and Geraldine Lambert. According to the terms of the Will, Mr. Smith left his entire Estate to his blood niece, Jeanette, his blood nephew, Ed, and his three nieces by marriage, the daughters of Virginia K. Jones.

A few days after executing his Will, Mr. Smith signed an additional page in the presence of Mrs. Jones only. It was not dated nor signed by witnesses and it purported to leave Mr. Smith's home and all of his personal property to Mrs. Jones. That page, generally referred to as “Itemized Listing Attachment” was not testamentary in character and was declared null and void by the Court without contest. There is no issue involving that page presently before the Court.

After the death of Mr. J. T. Smith, on May 23, 2006, and the payment of some of Mr. Smith's bills, Virginia K. Jones withdrew the remaining $34,039.79 from his account (which ***6** she now owned) and transferred it to her own account. She promptly filed a claim against his Estate for $21,597.33 for Mr. Smith's bills, which she had paid, from the monies she inherited from him. (R 40)

The Chancellor set aside the inter vivos gifts resulting from Mr. Smith making Mrs. Jones the co-owner of his checking account. He ordered that those funds, together with all interest earned on those funds, totaling in excess of $484,000.00, be returned to the Estate of J. T. Smith. The Chancellor declined to set aside the Will of Mr. Smith.

Jeanette and Edward filed a post-trial motion asking that the Estate of Mr. Smith be given an actual Judgment which could be collected, seeking interest, and seeking a constructive lien on certain property of Mrs. Jones and her daughters, including the cash in their possession. (R 168-170) The Chancellor did grant a Judgment and expanded the amount due to the Estate by adding in all interest the Defendants had earned on the money taken from Mr. Smith. All other relief requested by Jeanette and Edward was denied. (R 185-186, RE 40-41) That decision lead to this Appeal by Jeanette W. Brown and Edward J. Wilson, Jr. Mrs. Jones and her daughters have filed a Cross-Appeal seeking to retain Mr. Smith's money. (R 203)

*7 SUMMARY OF THE ARGUMENT

The Chancellor found that a confidential relationship existed between J.T. Smith and Virginia Jones and therefore a presumption of undue influence arose, with regard to inter vivos gifts, consisting of approximately $484,000.00. He likewise found that the confidential relationship existed at the time Mr. Smith executed a Will which left a majority of his estate to Mrs. Jones and her daughters. The undisputed proof, as found by the Chancellor, was that Mrs. Jones was involved with the preparation of Mr. Smith's Will and that she was present at the time of its execution. Therefore, if the Chancellor determined that a presumption of undue influence did not arise as to the testamentary gifts, that was a misapplication of the law in such cases, and an **abuse** of discretion.

If, however, the Chancellor's decision is to the effect that Mrs. Jones and her daughters overcame the presumption of undue influence, with regard to the testamentary gifts, by clear and convincing evidence, there is no substantial evidence to support that finding. Mrs. Jones and her daughters failed to prove good faith on the part of Mrs. Jones, deliberation or independent action and consent on the part of Mr. Smith.

Although the Chancellor ordered Mrs. Jones and her daughters to return over $484, 000.00 to the Estate of J.T. Smith, and ultimately granted a judgment for that amount, based upon breach of a confidential relationship and a find of un-rebutted undue influence, he refused to grant the Estate a constructive lien on the funds admittedly still held by the Defendants. That remedy was appropriate under the circumstances and failure to grant that relief was an **abuse** of discretion.

*8 ARGUMENT

I. There is no substantial evidence to support the validity of the Will of J. T. Smith, and therefore the Court erred by upholding that Will.

II. The Court erred by making contradictory finding that Mrs. Brown and Mr. Wilson both had and had not raised the presumption of undue influence, with regard to testamentary gifts.

The Chancellor was presented with numerous gifts to Virginia Jones, and her daughters, the other Defendants in the case below. The lifetime gifts made by Mr. Smith to Mrs. Jones and her daughters between February and April of 2005 were funds held previously in Mr. Smith's bank account. The remaining gifts were made by virtue of his Will, which was executed on July 26, 2005.

The Chancellor reviewed the seven factors, stated in numerous cases including two noted by the Chancellor, In *Re Estate of Reid*, 825 So.2d 1, 5 (¶13)(Miss. 2002) and *Wright v. Roberts*, 797 So.2d 992, 998 (¶18)(Miss. 2001), and determined that all factors supporting a confidential relationship existed between J. T. Smith and Virginia Jones. That portion of the Chancellor's Opinion is as follows:

The court would note in the case sub justice the proof as to each of the factors supports the existence of a confidential relationship between J.T. and Virginia. Fully realizing that the existence of a fiduciary duty and that a determination of what constitutes a confidential or fiduciary relationship are questions of fact2 and that the burden of proof lies with the parties asserting it - Jeanette and Edward the court finds that the existence of a fiduciary relationship between J.T. and Virginia has been proven by clear and convincing evidence. *AmSouth Bank v. Gupta*, 838 So.2d 205, 216 (32)(Miss. 2002)

The existence of a fiduciary or confidential relationship gives rise to the presumption of undue influence, *Vega v. Estate of Mullen*, 583 So.2d 1259, 1263 (Miss. 1991); See, *In Re Conservatorship of Moran*, 821 So.2d 903, 907 (¶20)(Miss. App. 2002) Having been established, the burden then shifts to the grantee - Virginia and her daughters - to show by clear and ***9** convincing evidence that there was no undue influence. *Whitworth v. Kines*, 604 So.2d 225, 230 (Miss. 1992)

Early on, the Mississippi Supreme Court established a three-pronged test to guide the trial courts in deciding whether or not the presumption had been overcome. Hamm v. Hamm, 146 Miss. 161, 110 So. 583 (1926). This same three-pronged test was spelled out in Murray v. Laird, 446 So.2d 575 (Miss. 1984). The first two prongs of that test, good faith on the part of the grantee, and full knowledge and deliberation of the grantor, have remained largely unchanged, although subsequent cases have fleshed out the meaning of both prongs. The third prong has historically been stated by the Supreme Court to be "independent consent and action" or, in other cases, "independent advice." In the case of Mullins v. Ratcliff, 515 So.2d 1183 (Miss. 1987), our Supreme Court modified the three-pronged test to permit independent consent and action to be proven without an independent advisor, In In Re Estate of Smith, 722 So.2d 606, 6122)(M. 1998) and 827 So.2d 673, 678 (114)(Miss. 2002) the court fleshed out more detail of the three-pronged test. Nevertheless, the Supreme Court has consistently held that "independent consent and action" is the appropriate third prong of the test, Mullins, supra, at 1194. The Court observed that independent advice is still the best way to satisfy this prong. Id.

Simply stated, to overcome the presumption of undue influence, the law still requires the following to be proved by clear and convincing evidence: (1) good faith on the part of the grantee/beneficiary; (2) the grantor's full knowledge and deliberation of his actions and the consequences, and, (3) the grantor must have exhibited independent consent and action. (RE 14-15)

The Chancellor did set aside the lifetime gifts to Mrs. Jones and her daughters but refused to set aside the Will and the testamentary gifts therein, explaining as follows:

> While the Court is of the opinion that Virginia has failed to refute the presumption of undue influence with respect to the gifts inter vivos, the court cannot conclude the same is true with respect to the gifts testamentary and J.T.'s Will. (Memorandum Opinion, RE 21)

That the Chancellor found a presumption of undue influence, with regard to the testamentary gifts, is supported by the initial Findings of Facts and Conclusions of Law he made at the conclusion of testimony on April 17, 2012. He found that Jeanette and Edward had clearly proven the existence of a confidential or fiduciary relationship by clear and convincing evidence and posed the question, as to what happened when they had met ***10** their burden. The Chancellor stated that the burden shifted to the Defendants (Mrs. Jones and her daughters) and then admonished the attorneys, in preparing their proposed Findings of Fact and Conclusions of Law, to pay close attention to certain questions. That portion of the Chancellor's bench ruling (RE 38-39) is as follows:

I want you to pay close attention to this since this is the area that I need the greatest deal of help in. To overcome the presumption of undue influence, the following must be proved by clear and convincing evidence: (A) good faith on the part of the grantee beneficiary who initiated the procurement of the will or transfer of the funds. (B) where was the will executed and in whose presence. (C) what consideration, if any, was paid for the will. Who paid the consideration? In the present case, there wasn't any proof in the record as to whether Mr. Dean was ever paid anything and by whom. (E) was there secrecy or openness in the execution of the instrument. The court is also of the opinion that the grantor's full knowledge and deliberation of the action and the consequences of his action is an important area of inquire. Was Mr. J.T. aware of the total assets that he had and their general

value? Did he understand who was his natural inheritors, who would get his assets? Did J.T. understand how the execution of the power of attorney and the transfer of the funds would effect his estate. Who controlled his finances and by what method. All of those areas need to be fleshed out and developed. J.T. must have exhibited independent consent and action. Of necessity, each case must be determined on its merits.

Now, while the appellate court, clearly, has modified *Murray* or the Murray requirements of the advice of a competent person disconnected from the grantee and devoted wholly to the grantor testators interest, such advice is still clearly the best way to show the independent consent and action still mandated by *Mullins.* (RE 39, T 326)

However, in a portion of the Memorandum Opinion, the Chancellor infers that the presumption has not arisen because there was no involvement by Mrs. Jones and her daughters in the preparation or execution of the Will. That portion of the Opinion is as follows:

> The prior holdings of this Court indicate a presumption of undue influence only arises in the context of gifts by will when there has been some **abuse** of the confidential relationship, such as some involvement in the preparation or execution of the Will. On the other hand, with a gift inter vivos, there is an automatic presumption of undue influence even without **abuse** of the confidential relationship. Such gifts are presumptively invalid. (RE 21-22)

***11** Based on those somewhat contradictory statements, in abundance of caution, Jeanette and Edward will address both potential findings by the Chancellor. First, is whether or not the presumption was triggered, with regard to the testamentary gifts to Mrs. Jones and her daughters. In this case, if you exclude the self-serving statements made by Virginia Jones, there are almost no fact disputes which are material. There are "holes" in the evidence, created by the death of James P. Dean, the attorney ostensibly prepared the Will, and the lack of knowledge by anyone other than Mrs. Jones.

The Chancellor definitely determined that a confidential relationship existed between J.T. Smith and Virginia Jones. However, he noted that that alone is insufficient to carry the day when the issue is testamentary gifts. The question then is, what more is required? Historically, where clear and convincing evidence of the existence of a confidential relationship has been proven, the Court has not required a great deal to trigger the presumption. It may also be something other than involvement in procuring the Will or participation in execution of the Will. Other "suspicious circumstances" will trigger the presumption. In an earlier case, which coincidentally bears a similar name, *Estate of Smith, et al. v. Averill and Pickering, 722* So.2d 606 (Miss. 1998) the Supreme Court reviewed several testamentary gift cases where little more than a confidential relationship was found and stated the following:

A presumption of undue influence arises in a will contest when a beneficiary occupies a confidential relationship with the testator and there is active participation by the beneficiary in either procuring the will or in preparing the will. *Simm v. Adams,* 529 So. 2d 611,615 [*612] (Miss. 1988). *Suspicious circumstances surrounding the creation of the will also raise the presumption. Pallatin v. Jones,* 638 So.2d 493, 495 (Miss. 1994). (Emphasis added by brief writer). However, we held the test was satisfied and the presumption was raised in in re Estate of Harris, 539 So.2d 1040 (Miss. 1989), with very little besides a confidential relationship. Harris, 539 So.2d at 1041. The beneficiary simply found an attorney at the testator's ***12** request and drove the testator to the attorney's office. Id. 722 So.2d at 611, 612.

P20. The appellees argue that it was suspicious that the testatrix changed the alternate beneficiaries in the last will to the grand-nephews instead of the Shriner's hospital since they contend she hardly knew these nephews. They also contend it is suspicious that David Smith looked at the will on the way out of Mr. O'Beirne's office. These are not the types of suspicious circumstances contemplated by this Court. We described a situation where the beneficiary was stepping in and out of the room at the time of execution as suspicious. *Pallatin,* 638 So. 2d at 495. The evidence offered by Averill and Pickering instead tends to show the testatrix's changes were unnatural. Averill and Pickering tried to show that a mother would not disinherit her children in favor of

her nephew by marriage and his family. However, this is not the proper consideration. Even if the changes were unnatural, this is not the proper basis for a finding of undue influence. [**15] *Wallace v. Harrison*, 218 Miss. 0,153, 65 So.2d 456, 459 (1953).

P21. However, Averill and Pickering presented ample evidence of the testatrix's mental infirmity and dependence upon the Smiths. When considered with David Smith's participation in taking the testatrix to Mr. O'Beirne's office, the presumption of undue influence arises. Id. at 612.

There is at least one case, In Re: Estate of Holmes v. Holmes-Price, 961 So.2d 674 (Miss. S. Ct. 2007), in which the Chancellor and the Supreme Court ignored any requirement, other than the existence of the confidential relationship. However, even though it was never mentioned as the basis for the presumption, we do know from the recitation of facts that Bertha (the beneficiary), who was found to have had a confidential relationship with the Testator, provided some assistance in preparation or execution of the Will.

From all of the case law, we know that any involvement in the preparation of the Will by a beneficiary is sufficient to raise a presumption. In In Re Estate of Harris, 539 So.2d 1040 (Miss. 1989). In the case now before the Court, Virginia Jones offered for probate a Will consisting of four pages. According to her testimony, James Porter Dean prepared the Will and called her so that she could pick it up at his office. There is no evidence that he ***13** talked to Mr. Smith about that. According to Mrs. Jones, Mr. Dean included with the Will blank pages in case Mr. Smith wanted to make changes to the Will and, according to Mrs. Jones, Mr. Dean told her how to do that. Mrs. Jones then claims that she picked up the Will, took it to Mr. Smith that day, and that he executed it in the presence of witnesses, that evening. (Deposition of Virginia Jones, Exhibit 20, pgs. 40-47, T 51 - 53) Mrs. Jones did clarify, however, that the Will signed by Mr. Smith on July 26, 2005, did not include the fourth page which left substantial portions of his estate to her. That portion of the Will, was set aside early in these proceedings. (R 59-60, RE 42-43) Mrs. Jones denied, in her deposition (Exhibit 20, p. 47) that she even knew about the preparation of the Will before receiving the call from Mr. Dean. She reiterated that testimony on cross examination, during the trial of the cause, but later, under questioning by her attorney, she admitted that she might have taken Mr. Smith to Mr. Dean's office to prepare the Will.

The only relevant evidence dealing with the preparation of the Will, independent of Mrs. Jones, is from the testimony of one of her former attorneys, John C. Ross, Jr. and one of Mrs. Jones' daughters. Mr. Ross testified that James Porter Dean said that he was approached by Mrs. Jones and asked if he would handle some business for Mr. Smith. That business turned out to be the Will. (T 244-245) Another Defendant, one of Mrs. Jones' daughters, Annette Springer, testified that the Will was not signed prior to her and Mrs. Jones preparing the “Itemized Listing Attachment” which gave much of Mr. Smiths property to Mrs. Jones. The final bit of evidence which is pertinent, is the check written by Mrs. Jones, on the joint account she jointly owned with Mr. Smith, for $75.00 on July 21, 2005. (Exhibit 3, p. 87, RE 44)

Although there can be little question that Mrs. Jones participated in the preparation of the Will, there is also undisputed evidence that she was present at the time the Will was ***14** executed. (T 53, 56-57) Mrs. Jones testified that she hand-delivered the Will to Mr. Smith, that she stood by his bed while Mr. Smith read the Will, and while it was signed and witnessed by two care-givers. Only one of the care-givers testified during trial, but she verified Mrs. Jones' statement. (T 89-90) Again, this is far less participation in the execution of the Will than that which triggered the presumption in the case of Pallatin v. Jones, 638 So.2d 493, 495 (Miss. 1994).

The Chancellor, in the case sub judice, dealt with all of these circumstances summarily in the following portion of his Memorandum Opinion:
It is true that Virginia carried the Will from Dean's office to J.T.'s home after he was essentially bed-ridden and that Virginia was present when J.T. executed the Will on July 26, 2005. These circumstances are not so suspicious as to create any adverse presumption. See, Estate of Volmer v. Volmer, 832 So.2d 615, 620 (¶15)(Miss. App. 2002) It should be noted that there was ample proof J.T. was mentally competent at the time he executed his Will and that he understood what he was doing.

In will cases the appellate court has found a presumption of undue influence only where (1) there is a fiduciary relationship and (2) there is an **abuse** of that relationship relating to the execution of the will. Matter of the Will of Wesson, 562 So.2d, 74, 78 (Miss 1990). Stated differently, in order to prevail the opponents would have to prove that Virginia asserted dominance over J.T. or that she substituted her intent for that of J.T. See, Matter of Estate of Grantham, 609 So.2d 1220,1224 (Miss. 1992). There was simply no proof that J.T. did not intend for all his nieces and nephew to equally share in the estate. Accordingly, the court declines to find against the Last Will and Testament which has heretofore been probated in this matter.

In summary, Jeanette and Edward were able to demonstrate that a confidential relationship existed between J.T. and Virginia (and her daughters) had the burden of showing by clear and convincing evidence that the gifts were not the product of undue influence. Virginia has failed to overcome the presumption. However, with respect to the testamentary gifts, Jeanette and Edward have failed to prove that Virginia **abused** the relationship. (R 165-166, RE 23-24)

According to a legion of Mississippi Supreme Court cases, Jeanette and Edward did not have the burden of proving that Virginia Jones **abused** the confidential relationship with ***15** J.T. Smith by direct evidence. What they did have to prove, to raise the presumption of undue influence, with regard to testamentary gifts, were two things; first, the existence of the confidential relationship, which is absolutely uncontested or un-contradicted in this case, and, second, "some involvement in the preparation or execution of the Will," or other suspicious circumstances surrounding creation of the Will. The proof, set forth in detail above, is that Mrs. Jones first approached the drafter of the Will, James P. Dean, in behalf of Mr. Smith, that she procured the Will at Mr. Dean's office, and that she was present at the time it was signed. The following excerpts, from cases stating the well-established law of the State of Mississippi, makes it clear that the presumption has been raised, and that the burden of showing no **abuse** was shifted.

In the case of *Jamison v. Jamison,* 96 Miss. 288, 51 So. 130, 131 (1910) the Supreme Court quoted from even earlier cases as follows:

> It follows, from the very nature of the thing, that evidence to show undue influence must be largely, in effect, circumstantial. It is an intangible thing, which only in the rarest instances is susceptible of what may be termed direct or positive proof. The difficulty is also enhanced by the fact, universally recognized, that he who seeks to use undue influence does so in [**47] privacy. He seldom uses brute force or open threats to terrorize his intended victim, and if he does he is careful that no witnesses are about to take note of and testify to the fact. He observes, too, the same precautions if he seeks by cajolery, flattery, or other methods to obtain power and control over the will of another, and direct it improperly to the accomplishment of the purpose which he desires. Subscribing witnesses are called to attest the execution of wills, and testify as to the testamentary capacity of the testator, and the circumstances attending the immediate execution of the instrument; but they are not called upon to testify as to the antecedent agencies by which the execution of the paper was secured, even if [*693] they had knowledge of them, which they seldom have... The only positive and affirmative proof required is of facts and circumstances from which the undue influence may be reasonably inferred. Id at 131.

In another case, our Supreme Court elaborated with the following:
"It is not now -- and never has been -- the purpose of the law to frustrate the true wishes of any person to make a gift or devise to whomever he pleases; nor, most assuredly, to prevent the making of a gift to a person to whom he ***16** owes a debt of gratitude. Indeed, expressions of gratitude should have every encouragement in law.

But a court of equity has an equal obligation to be certain, in a transfer between parties in a fiduciary relation, that an **elderly** or weak person is not **abused** or overreached. There exists a very simple rule which should be observed by any compassionate or considerate person, aside from any rule of law: In the singular event you happen to be in the dominant position in a fiduciary

relation and the person dependent upon you tells you he wants to give you his life'S savings or property far beyond any sum you may have earned, have the decency to see that he talks to someone besides you.

Put more simply, when a court of equity is faced with a large gift to a dominant party by the weaker in a confidential relation, it must hear from someone besides the beneficiary, or receive clear and convincing evidence beyond that from the lips of the beneficiary, this is, in truth and in fact, what the donor wished to do on his own.

This rule of law can be quite easily satisfied by any conscientious person. It imposes no hardship or difficulty to the expected beneficiary. Yet, it is also the one safeguard against deceit, overreaching, fraud and plunder by a strong person over a weak person, dependent upon him." Madden v. Rhodes, 626 So.2d at 624 and 625

The only evidence that can be characterized as refuting the **abuse** of the confidential relationship comes from Virginia Jones. The Chancellor in this case seemed to rely upon that testimony, after having acknowledged that the courts should exclude such evidence. The Chancellor stated the following in his Opinion:
This Court has previously found that the testimony of the proponents or interested parties is not sufficient to rebut the presumption of undue influence.

In those cases where you admittedly have a confidential relations transfer from a dependent to a dominant party, it seems to me that the ultimate test should be something on the order of the following: *Excluding the testimony of the grantee, those acting in the grantee's behalf (such as the attorney), and any others who could have a direct or indirect interest in upholding the transfer (such as grantee's family), is there any other substantial evidence's* either from the circumstances, or from a totally disinterested witness from which the court can conclude that the transfer instrument represented the true, untampered, genuine interest of the grantor? If the answer to this question is yes, then it becomes a question of fact whether or not there was undue influence. If the answer is no, then as a matter of law the transfer is ***17** voidable, In Re: Estate of Holmes v. Holmes-Price, 961 So.2d 674, 681 (Miss. S. Ct. 2007) See also Pallatin v. Jones, 638 So.2d 493, 495 (Miss. 1994) and Vega v. Estate of Mullen, 583 So.2d 1259, 1275 (Miss. 1991). (Emphasis added by brief writer)

Although it seems clear from the initial Findings of Fact and Conclusions of Law by the Chancellor and most of the Findings and Conclusions in his Memorandum Opinion, that he determined, as a matter of law, that the presumption of undue influence was established, by clear and convincing evidence, with regard to the testamentary gifts, it is certainly clear that such should have been the Findings and Conclusions of the Trial Court. There simply is no evidence to the contrary.

III. The Court erred by finding that Mrs. Jones and her daughters had overcome the presumption of invalidity of the Will as a result of undue influence, by clear and convincing evidence.

Once a presumption of undue influence has arisen, it is incumbent upon the beneficiaries of testamentary gifts, to prove by clear and convincing evidence that the Will offered for probate is in truth an expression of the intent and desires of the Testator. In numerous cases, the Supreme Court of Mississippi has discussed a three-pronged test the trial courts should use when deciding this issue.

> Simply stated, top overcome the presumption of undue influence, the law still requires the following to be proved by clear and convincing evidence: (1) good faith on the part of the grantee/beneficiary; (2) the grantor's full knowledge and deliberation of his actions and the consequences; and, (3) the grantor must have exhibited independent consent and action. *See Hamm v. Hamm,* 146 Miss. 161, 110 So. 583 (1926) and *Murray v. Laird,* 446 So.2d 575 (Miss. 1984).

In the case of *Mullins v. Ratcliff,* 515 So.2d 1183 (Miss. 1987), our Supreme Court modified the three-pronged test to permit independent consent and action to be proven ***18** without an independent advisor. *In In Re Estate of Smith,* 722 So.2d 606, 612 (22)(Miss. 1998) and 827 So.2d 673, 678 (¶4)(Miss. 2002) the court fleshed out more detail of the three-pronged test. Nevertheless, the Supreme Court has consistently held that "independent consent and action" is the appropriate third prong of the test, *Mullins, supra,* at 1194. The Court observed that independent advice is still the best way to satisfy this Prong. *Id.*

In the case of *Estate of Hall,* 32 So.3d 506, 516 and 517 (Miss. Ap. Ct. 2009), the Court of Appeals enumerated the factors for each prong, quoting from earlier Mississippi Supreme Court cases.

Did the beneficiary act in good faith? The relevant factors are set forth here, along with the related testimony:
A. Who initiated the procurement of a Will? According to the hearsay testimony of James P. Dean, admitted through Honorable John C. Ross, Mr. Dean was first approached by Virginia Jones. Virginia Jones picked the Will up from Mr. Dean. If we accept at face value the hearsay testimony of Mr. Dean, he had one conversation with J. T. Smith about a Will, at least seven months prior to its execution. Ms. Jones testified that Mr. Dean called her, not Mr. Smith, to have the will picked up. There is no clear and convincing evidence that the Will actually signed was initiated or procured by Mr. Smith, independent of Ms. Jones. At trial, Ms. Jones and her daughters testified that Ms. Jones helped J.T. during prior illnesses and she transported him to and from doctor's appointments well before his fall in December, 2004.

***19** B. Where was the Will executed and in whose presence? Ms. Jones, the mother of three girls, who were the beneficiaries of the Will in question, and who would not normally take under the laws of dissent and distribution, delivered the Will to Mr. Smith and he signed it in her presence. This was at a time when she was managing his business and financial affairs, and he was, as this Court has previously determined, dependent upon her. The Chancellor determined that a confidential relationship existed at that time between Mrs. Jones and Mr. Smith.

C. What consideration was paid? There is a check to James P. Dean for $75.00, dated July 21, 2005, five days before the Will was executed.

D. Who paid the consideration? The check to Mr. Dean was written on the account co-owned by J. T. Smith and Virginia Jones, and it was written and signed by Virginia Jones.

The factors applicable to the "knowledge and deliberation" prong of the test are as follows:
A. Was the (testator) aware of (his) total assets and their general value? There is no proof to support that awareness, other than the fact that Mr. Smith's mind was sound up until a few days before his death. On the other hand, several witnesses testified during trial that he had never discussed the value of his real estate, or made any statements about the amount of money he had in the bank.

B. Did the (testator) understand who (his) natural inheritors were? Again, there was no direct proof that he was aware of that, and several witnesses testified that he had not discussed with them his understanding of the law of dissent ***20** and distribution. The Chancellor found, in his opinion, that there was no proof that Mr. Smith understood the law of dissent and distribution.

C. Did the (testator) understand how the change would legally affect prior Wills? There was no proof that any Will existed prior to Ms. Jones becoming the legal and financial advisor to Mr. Smith.

D. Did the (testator) know that non-relative beneficiaries would be included? Again, no proof was offered on this issue and it is unknown whether Mr. Smith understood that nieces by marriage are treated differently from blood nieces and nephews by the law of Mississippi.

E. How dependent is the (testator) on those handling (his) finances? This Court has already determined that Mr. Smith was dependent upon Ms. Jones, and he turned over unfettered control of his finances to her. He made her co-owner of over $500,000. so that she could "sign checks" and executed a Power of Attorney giving her full control of his business at her request. Mr. Smith accepted her advice on the investment of his funds without question and told her to do whatever she needed to do. In fact, he acknowledged to Ms. Jones that he did not know about that business.

F. How susceptible is (he) to influence by those handling (his) finances? The short answer is from Ms. Jones' testimony; theirs was a relationship built on trust and she was the only person Mr. Smith trusted. The proof was not contradicted; Mr. Smith did everything that Mrs. Jones advised him to do.

There is no clear and convincing evidence that Ms. Jones acted in good faith or that Mr. Smith had full knowledge and deliberation in the execution of the Will, part of Exhibit 1. ***21** That leaves for exploration the third prong of the test, whether or not Mr. Smith exhibited independent consent and action. Although the Supreme Court no longer requires the independent advice of an attorney, and recognizes that other actions may satisfy this prong, the un-contradicted evidence is that Ms. Virginia Jones provided all legal, financial and banking advice to Mr. Smith from and after his fall of December 28, 2004. Therefore, if this prong is to be satisfied, it can only come from a one-time meeting with James P. Dean sometime in the fall of 2004, Therefore, the factors set forth in Murray v. Laird, 446 So.2d 575 (Miss. 1984), have application here. To establish independent advice to the testator the advisor must meet these requirements:
"(a) advice of a competent person, (b) disconnected from the grantee, and (c) devoted wholly to the grantor/testator's interest, we note three factors to meet. The advisor has to have conferred with the grantor/testator prior to the document drafting. *McDowell v. Pennington*, supra. However, "independent" advice in this sense means advice separate and apart from the beneficiary, both in the initiation and execution of the instrument.

The participation of the beneficiary/grantee, or someone closely related to the beneficiary, arouses suspicious circumstances that negate independent action. *McDowell v. Pennington, supra, Croft, supra.*

As a necessary adjunct to "advise and counsel", an advisor must have (a) knowledge upon which to base advice. Therefore, all factors previously named above with reference to the grantor/testator's full knowledge of his circumstances and the grantee/beneficiary's good faith must also be delved into by the advisor as a basis for his recommendation. The advisor needs to (b) know of the relationship of the grantor/testator to any beneficiary/grantee and the purpose or reason of an unequal division or distribution to donees/heirs of the same class, (c) the relationship of the non-blood donee and the duration of that relationship; (d) the relationship, or lack of relationship, to kinsmen, (e) knowledge of tax consequences (f) information as to the marital background, age, physical and mental health of a grantor/testator. (g) Inquiry by the advisor into whether the disposition is the free and voluntary act of an independent thinking, strong willed individual or whether the decision is imposed by the dominance of an over-reaching person will help him render better advice. All these factors will help the advisor learn of antecedent agencies that gave rise to the presumption of undue influence.

***22** The advisor does not have to be an attorney, but must be competent to advise and be wholly dedicated to the interests of the grantor/testator. If the chosen advisor does not have ability to answer all questions, persons with specialties can be secured.

It can be noted that consultation with an attorney does not necessarily overcome the presumption. The advisor has to be more than a mere scrivener; he has to render meaningful independent counsel. Moses, supra. But the grantor does not have to make his acts conform to the advice however." Montgomery v. Willbanks, 198 Okl. 684, 181 P.2d 240 (1947). 446 So.2d at 579.

There is no proof that James P. Dean was competent or was dedicated solely to the interests of the Testator, Mr. Smith. In fact, the Court can infer that Mr. Dean was not. First, the Will and the itemized listing attachment as prepared raise issues of his competence. Mr. Dean's instructions to Ms. Jones (according to her testimony), if in fact he gave them to her, likewise

show questionable skill. (Exhibit 20, 41/1-10) If Mr. Dean was both competent and dedicated only to Mr. Smith's interest, he would have followed up with Mr. Smith to complete the incomplete will, he would have taken steps to insure that Ms. Jones was not involved in the signing of the will, and he would have discussed the will with Mr. Smith, not Ms. Jones. If competent, he would have obtained the appropriate information from Mr. Smith, who was apparently of sound mind in July of 2005, and insured that the will was properly attested. Instead, Mr. Dean, acting as the attorney for Ms. Jones, submitted for probate a four page document knowing that the last page, the Itemized Listing Attachment, was not testamentary in nature. It was improperly prepared, and was entirely the product of Mrs. Jones and her family. He also knew, or should have known, that it was not properly attested and that it had been prepared without the benefit of independent advice. Still, Mr. Dean presented that document to the Court, presumably without disclosure to the Chancellor, and it was admitted to probate. Mr. Dean even included in the body of the Will an instruction to the Executrix, that he act as attorney for ***23** Mr. Smith's estate, which is a competence issue at best and an ethical issue at worst.

There is absolutely no evidence of the lawyer's knowledge about the relationship between Mr. Smith and Ms. Jones or the beneficiaries of the Will. No proof that Mr. Dean inquired of Mr. Smith as to the voluntariness of his choices or that he took the steps necessary to determine whether outside influence had been exercised in the planning of the estate. We do not know if Mr. Smith was told about, or understood, the distinction between nieces who were not blood relations and a niece and nephew who were. There is no proof that Mr. Dean was anything more than a scrivener.

In the case of *Croft v. Alder*, 237 Miss. 713, 115 So.2d 683 (1959), a reputable attorney read a Will, prepared by him, to the testator in the testator's hospital room and in the presence of the beneficiary of the Will. The testator told him the will was what he wanted but that was insufficient to overcome the presumption. In another case, *Jamison v. Jamison*, 96 Miss. 288, 51 So. 130 (1910), where there was no proof that the attorney knew of or inquired about the beneficiary's activities, the lawyer was not considered an independent advisor. Likewise, in a more recent case, the attorney left the testator and the beneficiary alone to review the terms of the Will after its preparation. He then returned and the Will was signed and properly witnessed in the presence of the beneficiary and the attorney. Both the lower court and the Court of Appeals held that the attorney was not an independent advisor. *Howell v. May*, 983 So.2d 313 (Miss. Ct. App. 2007).

Although it may be tempting to find that the true intent of Mr. Smith was to leave all of his property in five equal shares to Jeanette Brown, Edward Wilson, Jr. and the three daughters of Virginia Jones, the Court must first find clear and convincing evidence to overcome the presumption of invalidity of the Will admitted to probate. However, no Court can substitute its judgment for the intent of the testator where not properly proven. The ***24** following excerpt from Madden v. Rhodes, 626 So.2d 608 (Miss. 1993) is on point:
"It is not now -- and never has been -- the purpose of the law to frustrate the true wishes of any person to make a gift or devise to whomever he pleases; nor, most assuredly, to prevent the making of a gift to a person to whom he owes a debt of gratitude. Indeed, expressions of gratitude should have every encouragement in law.

But a court of equity has an equal obligation to be certain, in a transfer between parties in a fiduciary relation, that an **elderly** or weak person is not **abused** or overreached. There exists a very simple rule which should be observed by any compassionate or considerate person, aside from any rule of law: In the singular event you happen to be in the dominant position in a fiduciary relation and the person dependent upon you tells you he wants to give you his life's savings or property far beyond any sum you may have earned, have the decency to see that he talks to someone besides you.

Put more simply, when a court of equity is faced with a large gift to a dominant party by the weaker in a confidential relation, it must hear from someone besides the beneficiary, or receive clear and convincing evidence beyond that from the lips of the beneficiary, this is, in truth and in fact, what the donor wished to do on his own.

This rule of law can be quite easily satisfied by any conscientious person. It imposes no hardship or difficulty to the expected beneficiary. Yet, it is also the one safeguard against deceit, overreaching, fraud and plunder by a strong person over a weak person, dependent upon him." 626 So.2d at 624 and 625

The factual circumstances related to Mr. J. T. Smith's alleged “gifts” to Virginia Jones' daughters, Annette Stringer, Suzette Jones Marlar and Virginia Ann Finzel, are thoroughly covered above. This Court previously found that, “the three daughters had absolutely no awareness of this arrangement or that they were going to potentially receive $50,000.00 each.” Ms. Jones testified that her daughters did not know of the gifts until after Mr. Smith's death. However, all three daughters testified that they did know prior to Mr. Smith's death, including one who had previously testified that she testified to the contrary in her deposition. All three daughters testified that they did not ever discuss the gifts with Mr. Smith. That in itself is a suspicious circumstance. (T 118-119, T 122-123, T

***25** There are still other reasons to seriously question the independence of James P. Dean or his competence, or both. First, in the Will that he prepared (which is part of Exhibit 1) after Item II of the Will, denominated, “Special Bequest,” in which Mr. Smith left his entire estate to five individuals, he makes an “Additional Bequest” in Item VI. That provision is as follows:

> That I hereby direct my Executrix to disperse the property that I have outlined in an itemized listing attached to this Last Will and Testament, being personally indicated items that I want to go to certain persons, same to be Their absolutely and unconditionally.

We know from Mrs. Jones and the witness to the Will who testified, Geraldine Lambert, that no list of assets was attached and none was discussed. Mr. Smith did not question that glaring error.

In addition to the other problems with this Will mentioned above, we should note that Mr. Dean obviously had not been told what J.T. Smith wanted to do with his estate. Next, if we believe Mrs. Jones, Mr. Dean provided an “Itemized Listing Attachment,” which was apparently not intended to be incorporated in the original Will and had no independent clause for witnesses. It is dated July 26, 2005, the same date as the Will, but according to Mrs. Jones, was signed on a later date. We do know that one of the witnesses to the Will testified she had never seen that document. Mr. Smith signed this Will which had no attachment at that time and, according to the independent witness to the Will, he did not question that fact or indicate one should be included or what he wanted. He just signed the document Mrs. Jones handed him, knowing it was incomplete.

Next, we have the Petition to Probate Will and Issue Letters Testamentary, also part of Exhibit 1, which was prepared by Mr. Dean. In paragraph IV, Mr. Dean represents that ***26** all four pages (which would include the “Itemized Listing Attachment”) had been signed, sealed, published, and declare by the said J.T. SMITH as His Last Will and Testament, in the presence of MYRA LESLEY and GERALDINE LAMERT... “ This of course was untrue and, if he actually prepared the Will, or even bothered to read it, that fact was obvious on its face. Also of interest, and also erroneous, are the provisions of paragraph VII of that Petition. There, Mr. Dean represents that the Last Will and Testament of Mr. Smith has not been altered or amended since execution. Finally, paragraph X included the following:

> That the Petitioners would show unto the Court that J.T. SMITH, designated in His Last will and Testament His Heirs.

Clearly, the Will of J.T. Smith designated Mr. Smith's beneficiaries. Two of those happen to be heirs. There is a distinction between the two, and it raises the question of whether or not Mr. Dean knew of that difference. In an earlier suit, which was ultimately decided by this Court, the same James P. Dean was before this Court. Mr. Dean appealed an adverse decision in a legal malpractice case arising from an estate he handled and in which he had not correctly identified the intestate decedent's heirs-at-law. Dean v. Conn, 419 So.2d 148 (Miss. 1982)

Finally, the proof was that Mrs. Jones knew how to contact Jeanette Brown, and in fact, Mr. Dean had been corresponding with both Jeanette and Edward about the Estate of Mr. Smith. However, Mr. Dean, and Mrs. Jones, in the Petition to Close the

Estate (R 30-35) alleged the need for Publication of Process, and in fact that is exactly the type of process they utilized to notify Jeanette Brown and Edward Wilson, Jr. of the Petition to Close the Estate.

***27 IV. The Court erred by refusing to impose a constructive trust on money Mrs. Jones and her daughter obtained from Mr. Smith.**

In the Complaint filed by Jeanette and Edward, they asked the Court to impose a constructed trust upon the property Mrs. Jones and her daughters took from Mr. Smith during his lifetime, and after his death. (R 102-109) The Memorandum Opinion filed by Chancellor Malski, which was in fact the Judgment of the Court, did not address that issue. Therefore, Jeanette and Edward raised it in a timely filed post-trial Motion. (R.168-171). It was summarily denied by Chancellor Malski. (R185-186, RE 40-41) He did, however, order Mrs. Jones and her daughters to return over $484,000.00 to Mr. Smith's Estate and did grant a Judgment against them for that amount together with interest that had been earned on that money.

No reason was given for the refusal to impose a constructed trust, either in the written Opinion ruling on Motion, nor from the bench during the hearing. Regardless, our Supreme Court has said that, "(w)hen we review conclusions of law, including the applicability of a constructive trust, we afford the trial judge no discretion. Rather, we reach our own conclusions of the applicable law and how it should be applied. " Joel v. Joel, 43 So.3d 424, 429 and 430 (Miss. S. Ct. 2010)

In the case of *McNeil v. Hester*, 763 So.2d 1067 (Miss. S. Ct. 2000) the Supreme Court explained a constructive trust, and when it should be used, with the following:
A constructive trust is a fiction of equity created for the purpose of preventing unjust enrichment by one who holds legal title to property which, under principles of justice and fairness, rightfully belongs to another. *Allgood v. Allgood*, 473 So.2d 416 (Miss. 1985); *Russell v. Douglas*, 243 Miss. 497, 138 So.2d 730 (1962). This Court has defined a constructive trust as follows: A constructive trust is one that arises by operation of law against one who, by fraud, actual or constructive, by duress or **abuse** of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and ***28** good conscience, either has obtained or holds the legal right to property which he ought not in equity and good conscience, hold and enjoy. *Saulsberry v. Saulsbery*, 223 Miss. 684, 690, 78 So.2d 758, 760 (1955). *See also Alvarez v. Coleman*, 642 So.2d 361, 367 (Miss. 1994); *Planters Bank & Trust Co. v. Sklar*, 555 So.2d 1024, 1034 (Miss. 1990); *Sojourner v. Sojourner*, 247 Miss. 342, 153 So.2d 803, 807 (1963).

Clear and convincing proof is necessary to establish a constructive trust. Planters Bank at 1034 (citing *Allgood v. Allgood, supra; Shumpert v. Tanner*, 332 So.2d 411, 412 (Miss. 1976)). This Court has stated that "[i]t is the [confidential] relationship plus the **abuse** of confidence imposed that authorizes a court of equity to construct a trust for the benefit of the party whose confidence has been **abused**." *Davidson v. Davidson*, 667 So.2d 616, 620 (Miss. 1995)(quoting *Summer v. Summer*, 224 Miss. 273, 80 So.2d 35, 37 (1955)). Fraud need not be shown. Russell, 243 Miss. At 505-06, 138 So.2d at 734.

It should be noted that this Court's review of a chancellor's findings of fact, including those regarding a constructive trust, is limited in that this Court cannot set aside a chancellor's findings of fact so long as they are supported by substantial credible evidence. Davidson at 620 (citing Allgood, 473 So.2d at 421). However, this Court conducts a de novo review of questions of law, including those regarding the applicability of a constructive trust. Davidson at 620 (citing *Seymour v. Brunswick*, 655 So.2d 892 (Miss. 1995); *Harrison County v. City of Gulfport*, 557 So.2d 780, 784 (Miss. 1990)). Because the testimony offered at trial on this issue is not disputed by the parties, the sole question is whether the chancellor erred in not applying a constructive trust to the set of facts at hand. Thus, this issue is a question of law. Id at 1064.

A fair reading of the Chancellor's Memorandum Opinion, (RE 8-24) leads to the inescapable conclusion that Mrs. Jones and her daughters hold almost $500,000.00 of CDs that belong to the Estate of J. T. Smith. Under the circumstances, according to the cases cited, the Estate is entitled to a constructive trust on those funds.

***29 CONCLUSION**

Jeanette and Edward successfully raised the presumption of undue influence not only with regard to the inter vivos gifts made to Mrs. Jones and her daughters, but also as to the testamentary gifts to them. By agreed order, a "codicil" to the Will of J.T. Smith was declared null and void. It was procured by Mrs. Jones and prepared in part by James P. Dean, the drafter of Mr. Smith's Will, and Mrs. Jones and one of her daughters, Annette Stringer.

There is no question of the existence of the confidential relationship and the Chancellor found, and could not have done otherwise, that Mrs. Jones asked Mr. Dean to help J.T. Smith with a legal matter that was the Will, and she then handled the entire transaction with Mr. Dean, from picking up the will to being present when it was signed. The presumption of undue influence was raised.

The burden then shifted to Mrs. Jones and her daughters to prove, by clear and convincing evidence, good faith on the part of the grantees, full knowledge and deliberation by Mr. Smith, and that Mr. Smith exhibited independent consent and action. A few days after the Will was singed, Mrs. Jones had Mr. Smith sign another document that purported to gut the Will and she had already stripped him of over $450,000.00 dollars. Where was her good faith? The fact that Mr. Smith signed an admittedly and obviously incomplete will, along with all of the other ways he deferred to Mrs. Jones' advice, do not in any wise support full knowledge and deliberation. Finally, there is no proof of independent consent and action. Mr. Smith's only advisor as Mrs. Jones. The only other potential advisor was Mr. Dean and the proof is that Mr. Dean was not independent. Mrs. Jones approached him about Mr. Smith's Will. Mr. Dean could not have jumped through the hoops set forth in Murray v. Laird, 446 So.2d 575 (Miss. 1984), when he prepared an incomplete Will and ***30** entrusted Mrs. Jones to complete it. Neither the Court below nor this Court can assume that Mr. Deans law school diploma establishes that he was more than a scrivener.

The Chancellor, having found a confidential relationship between J.T. Smith and Mrs. Jones, and having set aside over $484,000.00 in inter vivos gifts, should have granted a constructive trust on all of those funds held in certificates of deposit and any other property acquired with those funds.

This Court should affirm the Chancellor's Judgment against Mrs. Jones and her daughters for the value of the inter vivos gifts and should impose a constructive trust on the funds and property in their possession obtained from J.T. Smith or, obtained with his funds. This Court should reverse the Chancellor with regard to the Will of J.T. Smith and the testamentary gifts therein and should declare the purported Will of J.T. Smith, dated July 26, 2005, void.

End of Document